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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/233,443	01/20/1999	BERNHARD H. VAN Lengerich	BVL-105	7428

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EXAMINER

WEBMAN, EDWARD J

ART UNIT PAPER NUMBER

1617

DATE MAILED: 04/01/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/233433

Applicant(s)

VAN LANGEVELD

Examiner

W GERMAN

Group Art Unit

1617

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 12/7/01

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

☒ Claim(s) 1-95 is/are pending in the application.

Of the above claim(s) 1-20, 23-25, 27, 28, 30-46, 53, 56, 58, 60-65, 68-95 is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 21, 22, 26, 29, 47-52, 54-55, 57, 59, 66-67 is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)-(d)

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).

☐ All ☐ Some* ☐ None of the:

☐ Certified copies of the priority documents have been received.

☐ Certified copies of the priority documents have been received in Application No. _____.

☐ Copies of the certified copies of the priority documents have been received

in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____

Attachment(s)

☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 23, 22 ☐ Interview Summary, PTO-413

☒ Notice of Reference(s) Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152

☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other _____

Office Action Summary

Regarding the restriction between intermediate and final product, applicant now argues that the intermediate product is dried before being placed in the final product and therefore there is no difference between the intermediate product and final product regarding water. However, the examiner's point is that such water is resupplied by such final products as liquid soap or gel-like pudding. The applicant may have misconstrued the examiner's argument in Paper No. 18 filed 7/5/01, because the word "intermediate" is missing before the word "product" on page 2, line 6.

The examiner notes that claims 24, 25 and 28 directed to non-elected inventions, were inadvertently listed as examined. Claim 26 was inadvertently listed as withdrawn from consideration, when in fact, it is directed to an elected invention.

Claims 56, 58 + 60 indicated as having been examined, in fact, depend from non-elected claims.

Claims 21, 22, 47-52, 54, 66, 67 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 21, 66, 67 "substantially" is vague. It can mean as much as 49.7%. *E.W. Bliss v. Cold Metal Process Co.* (DC N OHIO) 122 USPQ 238. Applicant argues, but does not claim density ranges.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 21, 22, 26, 29, 47-52, 54, 66, 67 are rejected under 35 U.S.C. 102(b) as being anticipated by Connick Jr. et al.

Connick Jr. et al teach an extruded dough product comprising fungi (abstract). Durum wheat is specified (column 2, line 44). 30-90% is disclosed (column 3, lines 34-36, column 5, lines 10-12). As to the claimed process limitations, such are not considered as patentable in product claims during prosecution before the Office.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21, 22, 24, 29, 47-52, 54, 55, 57, 59, 66, 67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lim et al in view of Anderson et al.

Lim et al teaches extruded articles comprising cereal grain (abstract), 30-100% is specified (column 3, line 55). Durum wheat is disclosed (column 3, line 43). Extrusion without heating is specified (column 8, lines 45-47); capsules are specified (column 9, line 8). Drugs are disclosed (column 9, line 14).

Anderson et al teach Brewers Yeast as a dietary supplement (abstract). Capsules are disclosed (column 2, line 35).

It would be obvious to one of ordinary skill to encapsulate brewer's yeast in the composition of Lim et al to achieve the beneficial effect of a dietary supplement.

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Claims 21, 22, 47-52, 54 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 21 "durum wheat" is vague. Does applicant intend durum wheat flour?

The entire plant?

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

NON-PROVISIONAL (B)
Claim 42 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims of copending Application No. 09/782,320. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims encompass those of '320.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

No claims are allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward Webman whose telephone number is 308-4432.

The examiner can normally be reached on Monday-Friday 9am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, ^{M. MOBLE} ~~Marianne Cintas~~ ⁰⁵⁷⁰ can be reached on 308-~~4725~~. The fax phone numbers for the organization where this application or proceeding is assigned are 305-3592 for regular communications and 305-1235 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 308-1235.

Webman: mv
March 15, 2002


EDWARD J. WEBMAN
PRIMARY EXAMINER
GROUP 1500